IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

HECK'S, INC.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR HECK'S, INC.

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STATEMENT OF THE CASE

Heck's is engaged in the operation of 13 retail stores in West Virginia and Kentucky. The Charleston, West Virginia warehouse involving the Teamsters Union and the Ashland, Kentucky Retail store, involving the Meat Cutters Union, are involved in these proceedings.

In 1964, the Teamsters Union secured union cards from 13 of the 26 employees of Heck's. These union cards authorized the Union to represent the employees in their dealings with Heck's. Operating under the mistaken belief that it represented a majority of the employees, the Union demanded recognition. Heck's

declined to recognize the Union. Thereafter, the Union secured one more union card giving it a card majority of one. The Union, without further communicating with Heck's filed a petition for a Board conducted election under Section 9 of the National Labor Relations Act. Two days after it filed this petition, the Union made another demand for recognition, without stating that it had received additional support. Heck's, feeling that the election procedure was the best method to determine the Union's majority status, again declined to recognize the Union.

In its election campaign, Heck's vigorously opposed the Union. The Board by credibility determination found that Heck's over-stepped the line of permissible conduct. The election was never held. The Board's Trial Examiner initially found that Heck's did not have a duty to bargain with the union; but upon reversal of the Board, Heck's was ordered to bargain with the Union.

In 1965, the Meat Cutters Union obtained union cards from 21 of 38 employees of Heck's in its Ashland, Kentucky store. With this slim majority the Union demanded recognition. The Company asked the union if the majority claimed contained department heads (supervisors). The Union replied that it had a majority with or without the department heads. Thereafter Heck's conducted a poll of its employees which resulted in a majority of the employees responding that they did not want the Union to represent them. The Union's demand for recognition was then declined.

The Board found that Heck's overstepped the line of permissible conduct in its poll of employees and

other anti-union statements. It accordingly held that no good faith doubt could exist as to the Union's majority status based on its *per se* doctrine. Heck's was ordered to recognize the union as the bargaining agent of the employees.

Both bargaining orders ended up in the Fourth Circuit Court of Appeals. After approving the Board's order in other regards (discharge for union activity and illegal threats and interrogation) the Court stated:

> However, the Board's finding that the refusal of Heck's, Inc. to bargain with the unions was a violation of §§ 8(a) (5) and (1) of the Act cannot stand. The Teamsters and Meat Cutters based their demands for recognition and bargaining on union authorization cards. In the Charleston area warehouse, the union had obtained 13 signed authorization cards from the employees in the requested unit of 26 members when the first demand for recognition was made. An additional card was procured the next day when a second demand was made. The Ashland store union fared a little better, obtaining 21 signed authorization cards from 38 employees in the unit, although there was some ambiguity as to the precise size of the bargaining unit requested. Heck's, Inc., refused to recognize and bargain with the unions under a claim of belief that they had not yet attained majority status in the respective bargaining units.
>
> We have recently discussed the unreliability of the cards, in the usual case, in determining whether or not a union has attained a majority status and have concluded that an employer is justified in entertaining a good faith doubt

of the union's claim when confronted with a demand for recognition based solely upon union authorization cards. We have also noted that the National Labor Relations Act after Taft-Hartley amendments provides for an election as the sole basis of a certification and restricts the Board to the use of secret ballots for the resolution of representation questions.

This is not one of those extraordinary cases in which a bargaining order might be an appropriate remedy for pervasive violation of § 8 (a) (1). It is controlled by our recent decisions and their reasoning. See *N.L.R.B.* v. *S. S. Logan Packing Co.*, 4 Cir. 386 F. 2d 562; *N.L.R.B.* v. *Sehon Stevenson and Co.*, 4 Cir. 386 F. 2d 551; *Crawford Mfg. Co.* v. *N.L.R.B.*, 4 Cir. 386 F. 2d 367 Cet. denied ..... U. S. ....., 36 LW 3403. There was not substantial evidence to support the findings of the Board that Heck's, Inc., had no good faith doubt of the unions' claims of majorities.

It is upon this finding that the Board sought its writ of certiorari. The issue before this Court is therefore as follows:

ISSUE

Whether the Court of Appeals for the Fourth Circuit properly construed Section 8 (a) (5) of the National Labor Relations Act, which requires an employer to bargain collectively with the representative of a majority of its employees by its holding that even though an employer has committed unfair labor practices it may not at the same time entertain a good faith doubt as to the Union's majority status.

SUMMARY OF ARGUMENT

Heck's argues to this Court that the present method of forcing recognition and bargaining upon an employer and its employees based upon union authorization cards is improper and contrary to the clear intent of Congress that an election is the sole method of determining a union's majority status when a question concerning this majority status exists.

The union cards demonstrate absolutely nothing more than that an employee has signed the card. The reason for his signing the card may be many—to get a solicitor out of his hair, to do a favor for a friend or because he does not have the employer's viewpoint available to him—any of which do not necessarily mean (as the Board holds) that the employee wants the union to represent him.

The Board's policy of rejecting the employer's claim of a good faith doubt as to the union's majority because of unfair labor practices committed after the demand for recognition is not sound reasoning. For it follows that an employer may be just as anxious to prevent the union from obtaining a majority as it may be to dissipate the claimed majority.

This Court is asked to formulate a rule requiring the Board to hold elections in all cases, involving a question concerning representation.

ARGUMENT

I. Authorization Cards—Their Net Worth

Authorization cards are usually postcard size tools used by a union to assist in its organizational efforts. Evidently, the union reasons, it should get the employee "on record" as favoring the union before it makes its bid for bargaining rights. These cards are universally and almost exclusively used to establish the 30% showing of interest required to petition for a Board conducted election under Section 9 of the Act.

Unlike the "laboratory conditions" of a Board conducted election, there are no rules on solicitation of union authorization cards. Their solicitation is not regulated or supervised by the Board. The solicitors may apply virtually any pressure, short of actual coercion to secure the employees signature. *Peoples Service Drug Stores* v. *N.L.R.B.*, (CA-6) 375 F. 2d 551.

It is well known that cards are frequently signed for reasons other than to authorize representation. Some employees have difficulty in saying "no" to persistent pressure of fellow workers, friends or high-pressure salesmen of the union. Some are super-sensitive and are coerced under mild implied threats or coercion of the solicitors. Still others merely sign to "get them off my back". See Comment, *Union Authorization Cards*, 75 Yale L. J. 805.

As indicated in all three cases before this Court on this issue, cards are usually solicited and signed before the employer becomes aware of the union's

campaign. The Board on one hand has taken the position that the free flow of information to the employee is necessary to permit him to make up him mind, on the question of union representation. See *Excelsior Underware Inc.*, 156 NLRB 1236, where the Board adopted a rule requiring an employer to give the union the names and addresses of all employees in the voting unit within seven days of the setting up of the election by direction or consent. The Board listed as one of its reasons for adopting this rule that without it the employee's free choice would be impeded or:

> "In other words, an employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasoned choice, . . . without a list of employees names and addresses a labor organization, whose organizers normally have no right to access to plant premises has no method by which it can be certain of reaching all the employees with its argument in favor of representation, and, as a result employees are often completely unaware of that point of view."

In footnote 14 of this Case, the Board expanded the rule to cover all interested parties, in all Board conducted elections noting, "In short, the disclosure requirement here adopted applies whenever a Board election has been scheduled and insures all parties to the election, whatever their viewpoint, of an opportunity to communicate with the lectorate." It is therefore obvious that the Board itself feels that in selecting a representative all employees should be in possession of both sides of the issue.

Unlike the voter in a secret ballot election the employee, who is asked to sign an authorization card

has not had an opportunity to reflect on all the advantages and disadvantages. His effort to reclaim his card before recognition is demanded will usually be rejected. *N.L.R.B.* v. *S. S. Logan Packing Co.*, 386 F. 2d 562.

Just how extensive the union has gone to secure union cards improperly is difficult to report. The Board by its holding in *Cumberland Shoe*, 144 NLRB 1268, greatly restricted the presentation of evidence to establish improperly secured cards. The Board has stated that it will not accept evidence as to the intent of the card signer. The Board will only receive evidence of coercion or intimidation. If the employee is told by the union that "*a*" purpose of the card is to secure a secret ballot election the card will be counted regardless of what the signer thought "a" purpose meant. On the other hand, if the signer is told that "*the*" purpose of the card is to secure a Board election the Board will not count it toward the majority. The Board's reasoning on not allowing background testimony for the reason for signing the authorization card is that the intent is clear on the fact of the card. This *Cumberland Shoe* rule is unrealistic. The lapse of time between the signing and the testimony, the presence of company officials in the hearing room, the possible change of mind of the signer, etc., is not justification for rejecting the evidence *per se*. The Trial Examiner of the Board may of course consider these factors in its determination of credibility of the witnesses. It should not be precluded as unreliable before it is even received.

The Board itself has reflected on the unreliability of authorization cards. Under the pre 1947 Amend-

ments the Board held that the "intent" of the signer could be questioned under a card check majority. *Lady Esther Lingerie Corp.* 10 NLRB 518 (1938). Recognizing the inherent unreliability of cards the Board abandoned their general use in 1939 in favor of the more reliable Board conducted election. *The General Box Co.*, 82 NLRB 678.

Even the chairman of the Board, Frank McCulloch, recognized the difficulties involved. He reported the following factual picture of the 1961 Board conducted elections:

> In 58 elections, the unions presented authorization cards from 30 to 50 per cent of the employees; and they won 11 or 19 per cent of them. In 87 elections the unions presented authorization cards from 50 to 70 per cent of the employees; and they won 42 to 52 per cent of them. In 57 elections the unions presented authorization cards from over 70 per cent of the employees, and they won 43 or 74 per cent of them. (Section of Labor Relations Law, American Bar Association, pp 14-17.)

This report establishes clearly that employees who sign union cards do not necessarily want the union to represent them. The elections cited by the Board's chairman were not those involving unfair labor practices, which, according to the Board, make a free election impossible. These elections were the run-of-the-mill type elections. Where the union has slightly over a majority of employees signed upon authorized cards, (as was the case in both Heck's demands), it wins less than half of the Board conducted elections. It is no wonder that the union prefers the card check method of recognition. Yet, it is obvious that the

employees Section 7 right to join a union *or to refuse from joining a union*, is not protected.

In 1948, Harry Truman was counted out in his bid for election to the presidency by every pollster. Yet, when the vote was counted he had been elected. Obviously, a large segment of the voters were stating in public to the poll takers that they were not going to vote for Mr. Truman. Yet, when allowed to express their opinion in secret, they voted for Mr. Truman. Much the same was true in the early months of the 1968 presidential campaign. At least up to the middle of October, 1968, virtually all pollsters were giving the election to Mr. Humphrey. This was based on their taking the public opinion of the voters. The private opinion in secret, however, gave the election to Mr. Nixon. This, of course, is the reason for a secret ballot. It is reasonable to assume that employees are the same as average voters. Their rights to a secret election and unobserved expression of opinion should be no less than a voter. This is the democratic way. This is why, and only why, the system works.

We must thereby assume from the above related facts, that the authorization cards have no actual value to prove a union's majority status, and that their net worth to establish employee sentiment is zero.

II. The Right of Employees To An Election

Section 8 (a) (5) of the National Labor Relations Act states as follows:

> It shall be an unfair labor practice for an employer to refuse to bargain collectively with

> the representatives of his employees, subject to the provisions of Section 9 (a).

Thus, an employer is required to recognize and bargain with a union who represents a majority of its employees. At first impression this seems like a clear unambigious legal requirement. *Yet*, at the same time Section 8 (a) (2) of the Act provides:

> "It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . ."

Under this section a company who recognizes a union who does not represent a majority of its employees, has violated the Federal Law regardless of its good faith in the matter. This Court held in *Garment Workers Union* v. *N.L.R.B.*, (1961) 366 U. S. 731, 48 LRRM 2251, that an employer who recognizes a union that does not represent a majority of the employees violates Section 8 (a) (2) of the Act *per se.* A good faith belief of the union's majority status is irrelevant and no defense.

Putting these two sub-sections together the employer is on the throws of a dilemma. If he refuses to recognize a union who in fact represents a majority he envokes the Board's rath; as he did in this case before the Court; but, if he recognizes a union who asserts that it represented a majority when in fact it did not, he also envokes the Board's rath and may be ordered to refund out of his own pocket union dues withheld.

Congress in its wisdom set forth the election procedure in Section 9 of the Act, to prevent such dilemmas. This provision states in part:

> "Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board
>
> * * *
>
> The Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the Regional Office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

It is significant to note that the last portion relating that the Board "shall direct an election . . ." was rewritten from the original Act. The original Act stated that the Board ". . . may take a secret ballot of employees or utilize any other suitable method to ascertain such representation. . .", This was removed from the Act in 1947. It was not by oversight that Congress removed from the Board the power to determine representation by methods other than elections. The House Committee Report (H. Rep. No. 245 80th Cong. 1st Session) stated that the purpose of the change noted above was ". . . to do away with the practices of the old Board by which it has subjected literally millions of workers to control by labor unions notwithstanding that the employees did not wish the

unions to represent them and voted against the unions in the Board's elections." (Page 7) Even the union and company cannot deprive the employees of the right of the election by the use of cards according to the House Committee Report. "... but when the parties waive a hearing, the Administrator must conduct a secret ballot, not check membership cards as the Board sometimes has done in the past." (page 39) It should follow that if the union and company cannot force employees into the union without an election by mutual agreement, the Board cannot do so in collusion with the union against the company.

It will be noted that the present Act Section 9(a) refers to the union representative as one "designated or selected" by a majority of the employees. The Board in its Brief, page 18, construes this language "designated or selected" to mean any method including but not limited to an election. It is however, reasonable to construe this language as the different forms of secret ballot election, i.e., that "designated" means the choice between one union or no union in a single union election and that "selected" means a choice between more than one union in a multi-union election. See *Comment Union Authorization Cards.* 75 Yale L. J. 805 (1966)

The intent of Congress that the Board should conduct elections in cases involving questions concerning representation was further indicated in Section 8(b)(7)(c) of the Act, where the Congress made it illegal for a union to picket to force recognition" . . . where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the com-

mencement of such picketing . . ." and by Section 8(b)(4)(c) that it is illegal for a union to strike with an object of ". . . forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees, if another labor organization has been certified as the representative of such employees under the provisions of Section 9.

The statutory obligation of the Board is to effectuate the policies of the National Labor Relations Act. The purpose of the Act as stated in Section 1 is as follows:

* * *

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of *full freedom of association*, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. [emphasis supplied]

In addition Section 7 of the Act, spells out the rights of employees as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection *and shall also have the right to refrain from any or all of such activities . . .*" (emphasis supplied)

It is not enough to say that the union actually represents a majority of the employees most of the times when it obtains a majority showing on authorization cards. This is true because it is not enough to say that employee's rights are protected *only* most of the time. If protection of employees rights is the main object of the Act, then the system must work all the time, not just most of the time.

Section 9 of the Act, according to the Board, has established a procedure which employees can vote in "laboratory conditions", to determine whether they want a union to represent them. Great care is exercised to require both parties to campaign carefully without threats or promises on the part of the employer or the union. When the actual vote comes, the supervising Board Agent requires the most extreme formality and propriety in and around the polling place. When the ballots are handed out only the voter and Board Agent are permitted to touch them. All this is done before the watchful eyes of observers representing both the employer and the union. If there is the slightest question about a voter his vote is challenged and sealed to remain in the custody of the Board Agent until resolved. The ballots, when counted, are exposed to all parties. If an employee's name appears thereon, thus destroying the secrecy, it is declared invalid. With this extreme care in "effectuating" the policies of the Act on one hand, the Board permits unions to walk into an employee's home, with virtually no limits and threaten or promise and force the employee to "vote" for the union by signing a union card. The employee has none of the protection of an election. The employee's rights are not protected at

all. The entire purpose of the Act is defeated and frustrated. The Board even puts the employer in the position where he cannot even question the employees concerning the signing of these cards by receiving them into evidence by third parties. This is violative of the basic rules of evidence and contrary to due process of law.

In *N.L.R.B.* v. *Flomatic Corp.*, (CA-2) 347 F. 2d 74, the Court upheld the Board's finding that Flomatic violated Section 8(a)(1) by certain threats and promises. But the Court refused to go along with the Board's order requiring bargaining merely because unfair labor practices of "interference" were found. Regarding the bargaining order, the Court said:

> "A bargaining order, however, is strong medicine. While it is designed to deprive employers of a chance to profit from a stubborn refusal to abide the law, and although it undoubtedly operates to deter employers from adopting illegally intrusive election tactics, its potentially adverse effect on the employees' Section 7 rights must not be overlooked. Since a bargaining order dispenses with the necessity of a secret ballot election, there is a possibility that the imposition of such an order may unnecessary undermine the freedom of choice that Congress wanted to guarantee to the employees . . ."

The Board in many cases has set aside elections because of irregularities in the laboratory conditions. In *Peerless Plywood Co.*, 107 NLRB 429, the Board decided that neither the employer or the union can talk to employees in a "captive audience" speech (i.e. where attendance is compulsory) within 24 hours of the election. In *Gummed Products Co.*, 112 NLRB

1092, the Board found that if an employer or union circulates false information and the other side does not have an opportunity to dispute it the laboratory conditions are destroyed and the election will be set aside. The Board will reject a ballot of an employee if his identity can be established from the ballot. *Bridgeton Transit*, 124 NLRB 1047. This destroys the laboratory conditions. Likewise, where one side reproduces a sample ballot purporting to be a copy of an official ballot, the election will be set aside as unfair. *United States Gymsum Co.*, 124 NLRB 1026. If employees cannot (in the board's judgment) properly evaluate election propaganda the election will be set aside. *Heintz Division, Kelsey-Hayes Co.*, 126 NLRB 151. If a secret "straw vote" is taken before the official vote the election will be set aside. *Offner Electronics, Inc.*, 127 NLRB 991. Likewise interviewing employees away from their work station affects the laboratory conditions and may result in the election being set aside. *National Cateiers of Virginia, Inc.*, 125 NLRB 110. If the employer visits employees at their home to urge them to vote against the union (even without coercive statements (the election will be set aside. *F. N. Calderwood, Inc.*, 724 NLRB 1211. Where employees are paid to attend union meetings before the election the Board decided the standards of the election procedure will be lowered and a new election ordered. *Teletype Corporation*, 122 NLRB 1594. If the employer does not give the union the names and addresses of all employees well in advance of the election, the union may have the election set aside. *Excelsior Underwear, Inc.*, 156 NLRB No. 111. Misleading propaganda by either party prior to the election may result in the election being set aside.

Reiss Associates, 116 NLRB 217, Movies have resulted in elections being set aside. *Plochman & Harrison Cherry Lane Foods, Inc.*, 140 NLRB No. 11, as have racial propaganda which is in flammatory. *Sewell Mfg. Co.*, 138 NLRB No. 12, and even "chatter" in the line of poling place during the election, *Milchem, Inc.*, 170 NLRB No. 46.

The above cases show the great effort the Board employs to protect the laboatory conditions of selecting a representative, which is commendable on the part of the Board. Employees should be given the right to make up their own minds absence interference from either the union or the employer. However, if the union is to be permitted to go to employees in the manner used in the case before this court and force them to vote (by signing a union card) without the safe-guards of the usual election procedure, the entire purpose of the Act is destroyed. The clear intent of Congress was to place employees in a position of being able to decide these issues by being in possession of both sides of the union in question. To allow a union to drop in out of the sky and overnight, frequently unknown to the employer, sign up a majority of the cards by hook or crook and then force the employer to deal with the union is clearly contrary to this intent and in violation of the rights of the employees and of due process.

The Fourth Circuit in *N.L.R.B.* v. *S. S. Logan Packing Co.*, (CA-4) 386 F 2d 562 further dealt with this point as follows:

> We deal with the rights of employees. Under §7 of the Act, they are guaranteed the right to

choose their representatives and, under the Taft-Hartley Amendments of 1947, a rejection of representation is a concomitant right, guaranteed by the statute, of equal rank and dignity with the right to select a union. Under §9 and implementing decisions, there are elaborate processes and rules to insure that the choice of the employees is truly free and unfettered. There must be a secret ballot, so that each employee may express his true conviction free of any concern that employer, union, or others to whom he may have made a commitment, or of whom he may feel in awe, will know his true feeling. Conduct which seriously impairs the "laboratory conditions" under which such elections are to be held will result in their invalidation and new elections.

In stark contrast is a decisional rule that bypasses the election processes and places signed authorization cards on a parity with an affirmative vote in a secret election.

It would be difficult to imagine a more unreliable method of ascertaining the real wishes of employees than a "card check", unless it were an employer's request for an open show of hands. The one is no more reliable than the other. No thoughtful persons has attributed reliability to such card checks. This, the Board has fully recognized. So has the AFL-CIO. In 1962, Board Chairman McCulloch presented to the American Bar Association data indicating some relationship between large card-signing majorities and election results. Unions which presented authorization cards from thirty to fifty per cent of the employees won nineteen per cent of the elections; those having authorization cards from fifty to seventy per cent of the employees won only forty-eight per cent of the

elections, while those having authorization cards from over seventy per cent of the employees won seventy four per cent of the elections. This suggests that the greater the majority of authorization cards, the greater likelihood of a union election victory, but obviously there are exceptions. Though ninety per cent of the employees may have signed cards, a majority may vote against the union in a secret election. Overwhelming majorities of cards may indicate the probable outcome of an election, but it is no more than an indication, and close card majorities prove nothing.

The unsupervised solicitation of authorization cards by union is subject to all of the ciriticisms of open employer polls. It is well known that many people, solicited alone and in private, will sign a petition and, later, solicited alone and in private, will sign an opposing petition, in each instance, out of concern for the feelings of the solicitors and the difficulty of saying "No." This inclination to be agreeable is greatly aggravated in the context of a union organizational campaign when the opinion of fellow-employees and of potentially powerful union organizers may weigh heavily in the balance.

That is not the most of it, however. Though the card be an unequivocal authorization of representation, its unsupervised solicitation may be accompanied by all sorts of representations. "We need these cards to get an election. You believe in the democratic process, don't you? Do you want to deny people the right to vote? Isn't it our American way to resolve questions at the polls? Do you want to deprive us of that right? Are you a Hitler or something?"

As the affidavits tendered by the employer in this case, indicate, unsupervised solicitation of

cards may also be accompanied by threats which the union has the apparent power to execute. Few employees would be immune from a frightened concern when threatened with job loss when the union obtained recognition unless the the card was signed. Whether or not the organizers could ever obtain the power to procure the discharge of uncooperative employees is beside the point as long as they claim the power and the employee is without a basis for a firm disbelief of it. On a similar plane stand the reported assertions that the union had a right to require Logan's customers to cease doing business with it and thus to destroy Logan's business, and the threat that the right would be exercised if Logan's employees did not join the union. An employee might distrust the organizer's claim, but without a basis for its clear refutation, he cannot escape its influence.

Without adequate supervision, solicitors of authorization cards may resort to a wide variety of other threats. Discrimination in the exaction of initiation fees is frequently encountered, and, particularly where untrained fellow-employees are used as solicitors use of threats of discrimination against non-signers in the compilation of seniority rosters and other conditions of employment may be a strong temptation.

The unreliability of the cards is not dependent upon the possible use of misrepresentations and threats, however. It is inherent, as we have noted, in the absence of secrecy and in the natural inclination of most people to axoid stands which appear to be non-conformist and antigonistic to friends and fellow employees. It is enhanced by the fact that usually, as they were here, the cards are obtained before the employees are exposed to any counter argument and with-

> out an opportunity for reflection or recantation. Most employees having second thoughts about the matter and regretting having signed the card would do nothing about it; in most situations, only one of rare strength of character would succeed in having his card returned or destroyed. Cards are collected over a period of time, however, and there is no assurance that an early signer is still of the same mind on the crucial date when the union delivers its bargaining demand.
>
> For such reasons, a card check is not a reliable indication of the employees' wishes. (Footnotes Omitted)

The Board in its brief (page 39-40) cites this Court's finding in *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U. S. 702, to the effect that a bargaining order without an election is, at least in some cases proper. It is submitted that in *Franks Bros. Co.*, the employer did not question or raise the issue of the union's majority status at the time of the demand but rested its case upon its proffer that the union lost its majority status. This case is not in point, because no issue of good faith doubt was raised. Additionally, *Franks Bros.* was decided by this Court in 1944 long before the 1947 amendments which as reflected above clearly reject the use of the authorization cards to establish a contested union majority.

Perhaps the most reckless use of its authority in this area is the Board's Bernel Foam doctrine (*Bernel Foam Products Co.*, 146 NLRB 1277:) In that case the Board held that it will permit a union to go to an election and if it loses to obtain a bargaining order based upon the employer's refusal to bargain prior to

the election when it had a majority of the employees signed up on authorization cards. Under this rule a union has nothing to lose by going to an election when it can secure a majority of the employees' names on cards prior to the demand. This method totally rejects the employee as a factor in the collective bargaining process. His secret and personal opinion is rejected. His signature on union cards replaces his private opinion.

The Board's reliance upon this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring*, (1955) 351 U. S. 62, is mis-applied. (Board's brief, page 19-20) In the first place this court by way of dictum dropped a footnote (8 at page 72) relating that the election is not the only way an employer can satisfy itself as to the union's majority status. This was not an issue in this case before the Court. The issue was whether or not an employer need bargain with a union, who at the time of its demand for recognition was not in compliance of the non-communist filing provision of the Act (since repealed) but later came into compliance. Second, this Court specifically stated that it was not considering the question "that would have been presented . . . if there had been a bona fide dispute as to the existence of authorization from a majority of the eligible employees." 351 U. S. at 68 N. 2. This decision does not hold as the Board claims that authorization cards are appropriate to determine questions of representation but as all agree that the Act does not preclude an employer from recognizing a union voluntarily where the employer believes that the union does in fact represents a majority. Third, this Court did not speak in any way of the use of authorization cards

to establish a majority contrary to an employer's claim of a good faith doubt of that majority status. Fourth, the Court did not discuss (and evidently did not consider) the congressional intent of Section 9(c) of the right of an employer to an election. Lastly, the Court in its dictum that an election is not the only method to determine the union's majority status relied exclusively upon the pre 1947 amendment and did not discuss or evidently consider the 1947 amendments.

Here, Heck's, Inc., is relying upon the general unreliability of cards. Heck's is also relying upon the fact that the three prior cases involving it and the Meat Cutters Union before the Board at the time of the demand herein, resulted in a conclusion that the union did not in fact represent a majority. *Heck's, Inc.*, 159 NLRB No. 127; *Heck's, Inc.*, 159 NLRB No. 104; and *N.L.R.B.* v. *Heck's, Inc.*, (CA-4) 386 F. 2d 317.

In the Ashland case the only basis for rejecting the good faith doubt of Heck's is the conduct of a poll of employees conducted immediately after the demand and two other isolated incidents, one involving an alleged vague and at best, veiled threat by president Haddad, five months before the demand and the other involving a discussion between a minor supervisor and an employee in a friendly, social type non-work discussion shortly after the demand. (Appendix, pp 528-540)

In the warehouse case the union did not represent a majority when the initial demand was made. The Trial Examiner found initially that the demand was so confused that Heck's did not have to reply to it. (Appendix 435) However, the Board remanded the

case to the Trial Examiner with the instructions that the demand for recognition was not so confused. (Appendix 444-445) The Trial Examiner thereafter found that unfair labor practices after the demand were sufficient to justify a bargaining order on the basis of the majority claimed by authorization cards. It should be noted, however, that *after* the union made its first demand (which was not supported by a majority) and before it obtained a majority status, it filed a petition for an election. (Appendix 426-428)

Trial Examiner Thomas Maher, in his decision, after relating the factual background stated:

> Upon the foregoing conglomeration of scanty data the Board, through me, is being asked to conclude that the Union represented the majority of the Respondent's employees in a unit appropriate for bargaining and that President Haddad's refusal to bargain, as detailed above, was not grounded in good faith either as to his doubt of the majority, or of the appropriateness or scope of the unit requested, or both.
>
> Section 9 of the Act provides the framework for the laboratory conditions which the Board deems so essential for the determination of employee representation. Through appropriate rules of decisions and its regulations procedures have historically been availed of to provide a forum to assess the duties of those sought in a bargaining unit, the extent of unit's scope, and a myriad of complications that must be resolved to achieve a reasonable determination of the unit in which a fair election is to be held; all of this through the orderly participation and contribution of both employer and union rperesentatives. Similarly in the conduct of the election itself,

> where eligible employees are permitted the privacy of their choice, safeguards are provided in the form of challenge available to all parties to insure that eligibility is maintained and that irregularity is eliminated.
>
> With all due respect to able counsel participating in this proceeding and with full recognition of my own procedural limitations, I fail to see how the materials presented in evidence here provides an adequate substitute for the orderly procedure and determination customarily available.

Considering all the facts of the case before this Court it is clear that the best method to resolve the question of representation was an election.

III. Unfair Labor Practices And Good Faith

Even assuming *arguendo* that the Board acts within its authority to compel bargaining based on the union's majority status evidenced by authorization cards and absence of good faith on the part of the employer, it seems clear that subsequent unfair labor practices have nothing to do with good faith at the time of the demand.

The Court in *N.L.R.B.* v. *S. S. Logan Packing Co.*, (CA-4) 386 F. 2d 562 stated "* * * in a typical case subsequent unfair labor practices have a tendency to prove only the employer's opposition to the union's organizational efforts. They throw no light on his belief or disbelief of the union's claim of majority status." In *N.L.R.B.* v. *River Togs, Inc.*, (CA-2) 382 F. 2d 198, the Court refused to enforce a bargaining order of the Board, holding that an employer may properly have

reasonable doubt as to the union's majority status in view of the general unreliability of authorization cards. The Court further stated that the employer's subsequent unfair labor practices could have been motivated by an effort to prevent the union from obtaining a majority status rather than, as the Board found, to dissipate the union's claimed majority. The Court found that other unfair labor practices were supported by substantial evidence. In *N.L.R.B.* v. *James Thompson & Co.*, (CA-2) 208 F. 2d 743, Judge Learned Hand stated that the employer's refusal to recognize "* * * however, unlawful in itself it might have been, throws substantially no light on how far he thought the effort had succeeded to form a union. As a penalty it might be proper but as a link in reasoning it seems to us immaterial." See also in accord *N.L.R.B.* v. *Montgomery Ward & Co.*, 377 F. 2d 452 and cases cited therein.

The matter of good faith depends on a state of mind. Of course, the courts must look at all the circumstances surrounding the event to arrive at its conclusion as to the actual state of mind of the person involved.

It offers no solution to pre-determine a state of mind by merely stating as the Board has done, that whenever unfair labor practices have been committed which supposingly undermine the union's majority, the company could not have had a good faith doubt as to the union's majority status. This is, of course, another *per se rule* of the Board. *N.L.R.B.* v. *United Mineral & Chemical Corp.*, 391 F. 2d 829 (CA-2)

Consider this example: A Company president receives from his secretary a message that a union

agent is in the waiting room to talk to him. He is unaware of any union movement among his employees. He calls his top supervision who are also unaware of any union movement. His attorney advises him not to talk to the union agent. He refuses to see him. He then receives a letter in the mail demanding recognition and offering to prove the majority status by a card check. Stopping at this point the president surely must have a good faith doubt that the union represents his employees. He notifies the union that he doubts the union's majority claim and will not recognize the union, unless the union proves its majority by an acceptable method which would not include the card check method. Up to this point the Board would probably hold that the company who has not committed any unfair labor practice need not recognize or bargain with the union.

Assuming further that after this, the company supervision became curious about the call from the president and asked around among the employees if they know anything about a union movement (which even though it is illegal, this a natural thing to do) the next question would be who is involved in the union push (also a natural question—but illegal). Thereafter the company official questions several employees about the union and threatens to close down if the union were to come in. It is at this point that the Board would hold the unfair labor practices would tend to undermine the union's majority status, and a bargaining order would issue. Assuming two points to be fact, i.e., the company had a good faith doubt on the date of the demand and the subsequent unfair labor practices undermined the union's status with the employees,

it does *not* follow that the second fact (the unfair labor practices) has anything at all whatsoever to do with the good faith doubt in the first instance. The Board, none-the-less holds, as it did in the case before the Court, that it will not be concerned with the employer's state of mind at the time of the demand in light of the subsequent unfair labor practices, which may not have been committed by the person upon whom the burden of doubt rests.

For the Court to adopt this reasoning would be the same as to say that an accused man is guilty of the crime simply because he later resisted arrest on the warrant. Of course, this Court would not stand still for a defendant's rights to be so violated. Should a corporation's right be considered as any less than that of an accused criminal? Due process is due process regardless of what court it is in.

This *Per se* rule of the Board, by its very nature, precludes the possibility of the employer introducing evidence to show that it had a good faith doubt at the date of the demand. Several Circuit Courts have refused to enforce Board orders where the Board would not consider other factors which occurred at the same time as the unfair labor practices which followed the demand for recognition. *Hannaford Bros. Co.* v. *N.L.R.B.*, (CA-1) 261 F. 2d 638; *Edward Fields, Inc.* v. *N.L.R.B.*, (CA-2) 325 F. 2d 754; *N.L.R.B.* v. *Dan River Mills*, (CA-5) 2744 F. 2d 381; *Montgomery Ward & Company.* v. *N.L.R.B.*, (CA-6) 377 F. 2d 452.

The Fourth Circuit in *N.L.R.B.* v. *S. S. Logan Packing Co.*, (CA-4) 386 F. 2d 562, analyzed this problem faced by the employer as follows:

The natural response of an employer entertaining real doubt of the union's claim is an affirmative, investigatory one. The doubting employer, seeking to inform himself, will turn to interrogation, though there was precious little of it here, and, possibly to surveillance. He, technically, has a right to interrogate for the purpose of resolving his doubt, but not inquiry can be limited to a search for answers to the one question, "at any time on or before the date of the bargaining demand, have you signed a union authorization card?" Affirmative answers must be probed more deeply, if the investigation is to have a semblance of adequacy. An adequate investigation must include questions designed to disclose the possible presence of threats or misrepresentations and of subsequent attempts at revocation. When the interrogation is designed to expose all of the circumstances surrounding the card signing, it approaches so perilously close to the employee's real wishes, that the interrogator may well overstep the narrow bounds; he certainly will expose himself to the grave risk of unfair labor practice charges which, on the basis of conflicting recollections, the Board may sustain. In the colorful language of Judge John R. Brown, [*N.L.R.B.* v. *Dan River Mills*, 274 F. 2d 381, 388-389 (5th Circ., 1960)] referring to such an employer:

> * * *But like Odysseus, he stands almost helpless as he makes the perilous passage between Scylla and Charybdis. If he makes a simple inquiry of each employee and accepts the simple answer, the very pressures apprehended may well bring about the employee's confirmation as well. If he probes deeper, the inquiry unavoidably becomes an investigation or intimations in terms of relative evaluation of union or nonunion conditions. At that

> point, undefined and undefinable, the inquisitor trespasses either on forbidden ground or flounders in the Serbonian bog surrounding it so that what started out to be a means of compliance with law is turned into an affirmative charge of an unfair labor practice. And all the while, all that is done, all that is said, all that is asked, all that is answered, rests in the uncertain recollection of the partisan participants. What begins as the employer's quest now ends in the employer's flight. And no longer will his conduct be judged alone by what was said. Now, through the unavoidable nature of our legal administrative machinery, it will be judged by what interested partisans say one said was said, or what others said to have said say was said.
>
> A finding of a § 8(a)(1) violation out of such investigatory conduct of an employer tends to confirm his claim of a good faith doubt of the union's majority; it has no tendency to negate it.

Inconsistently the Board holds as it did in this case, that it will not take the word of a company official as to his motive for denying recognition on a card check demand. Yet at the same time the Board will not permit the company to show the motive of the card signer to establish whether or not the signer actually intended to designate the union to represent it in fact.

Equally as inconsistent is the Board's approach to the employee's ability or inability to be frightened into abandoning his beliefs. On one hand the Board holds that virtually any statement or question directed to an individual employee by a company supervisor makes it impossible for that employee to be able to cast a vote

in secret without having the previous conduct of the employer's supervisor follow him into the voting booth and force him to cast his ballot against his true belief. On the other hand, the Board as cited *Supra* permits union officials to obtain signatures by hook or crook and then the Board will not permit the employee to explain why he signed.

RECOMMENDATIONS OF THE COURT

Of course, Heck's believes that the decision of the Fourth Circuit should stand and that it should not be required to bargain with the union pursuant to the rejected Board order. But, this is not enough. Heck's and thousands of other employers and unions should know if, and under what circumstances it should be required to bargain with any Union when there is doubt as that union's majority status among the employees. More important, is the unsettling impact upon employees, i.e., whether their rights are *fully* protected. We respectfully suggest the following:

1. The Board be prohibited from issuing a bargaining order, unless and until it has conducted an election among the employees involved.

2. The Board be authorized to issue a bargaining order after an election which the union lost *only* upon affirmative and conclusive evidence that the employer's unfair labor practices actually resulted in the union's loss of majority *and* that a re-run election after the correction of these unfair labor practices would be pointless.

It is significant that others in this field have recognized the problem of ignoring the rights of employees

and bending to the almost overwhelming demands of the unions or employers. In its exhaustive study of the issue, the University of Pennsylvania's Wharton School of Finance and Commerce* concludes as follows:

The authorization card issue involves the problem of equating the encouragement of collective bargaining with insuring the fullest freedom of association for employees—the right to join or not to join labor unions and to be represented thereby or not. In our view, the National Labor Relations Board has failed to establish such a policy. More than 30 years after the authorization card policy was instituted, and after much shifting of interpretations and emphasis in this time, the Board's policy is less acceptable to courts and to commentators than ever.

We feel that the basic failure of the Board's policy, in light of the statutory purposes, has been its refusal to recognize in practice that the secret-ballot election is a far superior test of employee support than authorization cards. Although the Board will agree in theory, its practice reflects a reliance on authorization cards in numerous cases where the employer's misconduct is minimal and would appear not to have coercive effect on employee freedom of choice.

Basic to this problem is what we feel are two plain errors in policy: (1) the reliance on the good-faith

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*"Union Authorization cards and the N.L.R.B.—A study of Congressional Intent Administrative Policy and Judicial Review" (University of Pennsylvania Press, Philadelphia, Pa.).

doubt test to determine whether the employer is entitled to an election, *i.e.*, to determine whether a "question of representation" exists; and (2) the failure adequately to regulate cards and police their solicitation. We discuss these points below.

1. We feel that the test of good-faith doubt is so uncertain and unworkable in determining whether an election should be held that, in order best to effectuate statutory purposes, the Board should reject the test. Instead, since an employer can never know whether cards in the possession of a union actually reflect the desires of a majority, the statutory purposes require that the Board find that a question of representation exists whenever a card majority is claimed and that it conduct an election in all cases except where the employer voluntarily recognizes the union.

First, uncertainty is created by the good-faith doubt test because it is never certain whether the employees will have an opportunity to express their desires in a secret-ballot election. And, as the Board has long noted, there is more "certainty and prestige" in the results of a secret-ballot election. Second, the test of good-faith doubt in no way is relevant to determining a question of representation. Inquiry into the employer's conduct in no way indicates lack of doubt of the union's status; it may indicate opposition to the union, but that is hardly a reason for finding no question of representation.

Thus, the test of good-faith doubt is an irrelevant test, and for this reason has been held more and more in disfavor by the courts. In fact, the test in itself has promoted the opportunity for committing unfair

labor practices, for an employer seeking to find information in opposition to the union's majority claim treads a thin line when he talks to his employees about the union's strength. Nor does the test add in any manner to the obligation to bargain. Either the union represents a majority or it does not; the employer has an obligation to bargain in the former situation, but not in the latter.

Moreover, requiring an election in all cases, except for voluntary recognition, is fully consistent with congressional intent. It would comport with the views of Senator Taft, and that of practically all other members of Congress who spoke on the subject in the Taft-Hartley debates, who successfully argued for the employer's right to an election because he otherwise "has no way in which to determine whether [the union] . . . really does represent his employees or does not." This procedure would also eliminate from the employer the burden of having to determine, at the risk of being found in bad faith, matters such as the appropriateness of the unit sought by the union and inclusions or exclusions from that unit. The Board would determine these matters in the regular representation manner.

In sum, we believe that abolition of the good-faith doubt test and requirement of an election in all cases will better comport with statutory purposes, and will reflect a policy consistent with the intent of Congress, the fair needs of the parties, and an approach satisfactory to the courts.

2. Assuming *arguendo* that reliance upon authorization cards in lieu of an election is consonant with

statutory purposes, it is essential that the Board regulate the contents of the card and more stringently police their solicitation. There is no legitimate reason for the Board to refuse to prepare a clear card acceptable for representation purposes and refuse to accept any other card as valid for that purpose. Such a card should indicate in simple words that the signing of the card was the signer's indication that he wanted to join the union so that it might bargain for him.

As to policing the solicitation of the cards, we urge the rejection of the *Cumberland Shoe* rule. Instead, we would require that cards be invalidated whenever it was established that a solicitor failed to inform employees that, in words to this effect, the card would be treated as a vote for the union. Moreover, whenever the validity of the cards is put in issue, we believe the General Counsel should be required affirmatively to establish the circumstances under which the cards were solicited. This would require the General Counsel, as it does now, to authenticate the signatures on the cards. But once the employer presents evidence that the card was obtained through coercion or misrepresentation, we would require the General Counsel to produce the solicitor, or other parties present at the soliciting if he is unavailable, to testify as to the circumstances of the solicitation. Only so can the credibility issues, and other factual questions, be meaningfully resolved.

Although some may think this burden is harsh, we think it is necessary to protect the employee from the many pressures which can be placed on him by solicitors or friends. This requirement, since it would call for a solicitor to remember all solicitations on his part,

would encourage more soliciting of groups than of individuals, on whom the pressures can be more coercively exerted.

3. These policy changes do not, however, directly reach the difficult question of the course to follow in the few cases where employer conduct is found to render a free election impossible. In most cases, where the unfair labor practices are minimal, a cease and desist order and a re-run election is undobtedly sufficient. Without some reasonable indication that these unfair labor practices caused a defection from the union, the employees would be deprived of their free expression via the secret ballot. Similarly, where there is no indication of majority support through cards, the re-run election is the only appropriate remedy.

The hard decision to be made is in those cases where the union possesses a majority of cards but loses the election after pervasive employer unfair labor praceices (*e.g.*, direct threats of discharge, closing down the plant, and the like, if the union is victorious). Where this is the case, the decision must be made as to whether the inherent unreliability of authorization cards is sufficient to reject reliance upon them in any circumstance as a basis for a bargaining order. The statute itself does not give an express answer to the question, and therefore, the answer must be drawn from interpretation of statutory purposes.

The arguments on each side of the question are familiar. Of course, the Board's view is well-known. It feels that once an employer "has engaged in unfair labor practices, the results of a Board-conducted elec-

tion are a less reliable indication of the true desires of employees than authorization cards." Accordingly, when the Board finds that a union loses an election after substantial employer unfair labor practices, it will rely on authorization cards as a better indication of employee support and issue a bargaining order. The Board finds statutory support from the refusal of Congress in Taft-Hartley to adopt the House bill aimed at eliminating reliance on cards.

The opposing argument sees cards as so inherently unreliable that they should never be used to determine majority support. According to the proponents of this view, reliance on cards for a bargaining order frustrates statutory purposes, as indicated in *N.L.R.B.* v. *Flomatic Corp.*, 347 F. 2d 74 (CA2-1965).

> Since a bargaining order dispenses with the necessity of a prior secret election, there is a possibility that the imposition of such an order may unnecessarily undermine the freedom of choice that Congress wanted to guarantee to the employees, and thus frustrate rather than effectuate the policies of the Act.

Further, the bargaining order suffers the defect of ignoring the interests of employees in order to punish the employer's misconduct. On balance, then, the card is never a valid substitute for an election as a basis for a bargaining order. As a leading proponent of this view has concluded:

> A secret ballot election may not, in every instance, reflect with perfect accuracy the desires of every individual who casts a ballot. It is impossible for me to accept, however, that such a ballot is less accurate than a union card

> requiring the disclosure of the individual's identity and preference. The secret ballot is fundamental to our political system. The cause of industrial peace would be well served if the Board would permit the secret ballot to be fundamental to the selection of a union representative. (Address to Kenneth C. McGuiness 68 L. R. R. M. 85)

Despite disagreement between the Board and the courts of appeals over the efficacy of relying on cards to order bargaining, the Board appears to be adamant in adhering to its view. Accordingly, the issue must be resolved either by Congress or the Supreme Court.

Fortunately, the Supreme Court has recently agreed to hear three cases in which the Board's use of authorization cards rather than a secret-ballot election is the sole issue. Thus, the Court will determine the very issue of whether authorization cards may be used to determine majority status as a predicate for the issuance of a bargaining order. (Footnotes omitted)

CONCLUSION

Respondent Heck's, Inc., would have this Honorable Court affirm the decision of the Fourth Circuit Court of Appeals and admonish the National Labor Relations Board that it is not the National Union Protection Board; that its duties consist of effectuating the policies of the Act, which include principally the protection of the rights of employees to bargain through a union or to refrain from bargaining through a union; that whenever there is a question as to the union's majority status the election procedure is the method of settling this question; and that it was not the intent

of Congress to permit unions to force membership upon employees by the card check method.

The Decision of the Fourth Circuit Court should be affirmed.

Respectfully submitted,

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March, 1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 573

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

GISSEL PACKING COMPANY, INC., ET AL.

and

No. 691

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner

v.

GISSEL PACKING CO., INC.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

Supplemental Brief For Gissel Packing Co., Inc.

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Supplemental Brief For Gissel Packing Co., Inc.

STATEMENT

This Supplemental Brief is submitted for the sole purpose of bringing to the attention of this Court certain authorities not available at the time this respondent's brief was submitted to the printers. The explanation as to each follows, below.

AUTHORITIES

In a thorough study of the authorization card issues, the University of Pennsylvania Press released, on February 26, 1969, the booklet by McFarland and Bishop, UNION AUTHORIZATION CARDS AND THE NLRB (U. Pa., 1969). This study supports the position of Gissel Packing Co., and is cited in the brief of Heck's, Inc. This was not received in this office in sufficient time to include it due to the printing leadtime necessary.

An additional major article was published as a result of a study by a committee of one of the major bar associations in the United States. This was received in this office on March 13, 1969. The conclusions reached, with detailed reasons and bases for them, are set forth at length in the article, which is highly critical of the use of authoriation cards by the NLRB. See 24 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 101 *et seq* (Feb. 1969)

The final additional authority is directly in point and was published in the Labor Relations Reporter dated March 17, 1969. In an opinion by Medina, J., the following appears in *Schwarzenbach-Huber Co. v. NLRB*, 2d Cir., 1969, ——F.2d——, 70 LRRM 2805, 2815:

> What do all these miscalculations and errors of fact and law by the [National Labor Relations] Board add up to? Surely they do not support the widely held supposi-

> tion that the Board and the Trial Examiners have a special expertise to handle this type of case. This "representation" (sic) card business is an abomination. As presently administered it is a pro-Union device that serves no other purpose than to afford a method by which elections can be bypassed and the Unions ushered in without giving the employees individually or collectively any voice in the matter. And this is accomplished by the invention of new *per se* rules of evidence and new standards by which the proofs are to be evaluated, that fly in the face of common sense and elementary concepts of justice and fair play. * * *
>
> * * *
>
> * * * The forgotten man seems to have been the employee who was one of those who comprised the unit of production and maintenance workers in the Company's Juniata Plant.

Respondent Gissel Packing Co. submits that the foregoing language applies with equal strength and substance to the situation in the instant cause.